

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF &
APPENDIX**

77-1434

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

B
P/S

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

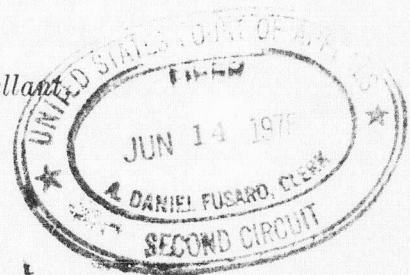
vs.

HOWARD COYNE,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NEW YORK.

**BRIEF AND APPENDIX FOR
DEFENDANT-APPELLANT**

ROBERT P. FREEDMAN,
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STATUTE.

Title 11, U.S.C. Section 25(a)...(10) at the first meeting of his creditors, at the hearing upon objections, if any, to his discharge and at such other times as the court shall order, submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate or the granting of his discharge; but no testimony, or any evidence which is directly or indirectly derived from such testimony, given by him shall be offered in evidence against him in any criminal proceeding, except such testimony as may be given by him in the hearing upon objections to his discharge:...

(b) Where the bankrupt is a corporation, its officers, the members of its board of directors or trustees or of other similar controlling bodies, its stockholders or members, or such of them as may be designated by the court, shall perform the duties imposed upon the bankrupt by this title.

QUESTIONS PRESENTED

1. Was the denial by the District Court for the Western District of New York of a motion to suppress evidence properly made?

2. Should the plea of guilty to two counts of the indictment herein be vacated and the case remanded to the District Court for further proceedings?

PRELIMINARY STATEMENT

This is an appeal from a decision and order of the U.S. District Court for the Western District of New York (John T. Curtin, District Judge), entered January 14, 1977, denying a motion made by the defendant to suppress evidence; and from a subsequent entry of a plea of guilty to two counts of an indictment charging Bankruptcy Fraud and Perjury. A Notice of Appeal to this Court was filed October 13, 1977.

STATEMENT OF FACTS

The defendant was the president, majority stockholder and manager of a closely held corporation known as Sleep

Shops Corporation. Creditors filed a petition in the Bankruptcy Court of the Western District of New York seeking the involuntary adjudication of bankruptcy of said corporation. Subsequently, a Notice of First Meeting of Creditors was sent to the corporation directing it to appear in the Bankruptcy Court and give testimony.

On September 19, 1972, the defendant appeared with counsel and was directed to take the witness stand by the Bankruptcy Judge. He then underwent extensive examination by the attorney for the trustee and the Bankruptcy Judge over sessions lasting two days.

Thereafter, the defendant was indicted on February 27, 1974 by the Grand Jury empaneled by the U.S. District Court for the Western District of New York in a thirteen count indictment alleging various counts of fraud, perjury and conspiracy.

Subsequently, a motion was made by the defendant to suppress evidence product of the use or derivative use of the testimony of defendant at the First Meeting of Creditors. The District Court thereupon ordered a hearing to be conducted in order to ascertain whether or not the government had made use and to what extent it had made use of the testimony of the defendant.

Thereafter, the District Court denied the motion to suppress made by the defendant, deciding that the defendant had not been designated by the Bankruptcy Judge in accordance with Bankruptcy Act, Title 11, U.S.C. Section 25(b). The Court did not reach the question as to whether the government had shown that it had not made improper use of the testimony, nor did the Court reach the question as to whether the statutory grant of immunity was automatic.

Thereafter, the defendant pleaded guilty to two counts of the indictment, expressly reserving his rights to appeal.

POINT I

THE DECISION APPEALED FROM IS IN ERROR IN
ITS HOLDING THAT THE DEFENDANT WAS NOT
"DESIGNATED" BY THE BANKRUPTCY COURT.

The statutory immunity granted by Bankruptcy Act, Title 11, U.S.C. Section 25(a)(10), as extended to corporate principals by Title 11, U.S.C. Section 25(b) does not require a ritualistic designation in this case. Here, the defendant was the president, principal stockholder and manager of a closely held corporation, and was the one individual who could supply information to the creditors and further the aims

of the Bankruptcy Act. When defendant's corporation received the notice commanding appearance before the the Bankruptcy Court, defendant had no choice but to appear and testify when directed by the Bankruptcy Judge. U.S. v Castellana, 349 F 2d 264 (2 cir. 1965), exclusively relied upon by the Court below, is easily distinguishable. In the Castellana case there were several principals of a corporation who testified in the Bankruptcy Court and who claimed immunity unsuccessfully. The Court, in Castellana, held that it had not been established that any particular one of the principals had been designated for these purposes. Those defendants-witnesses were not performing duties imposed upon them when they were examined in Bankruptcy Court. It should be noted, however, that the dissenter in Castellana would have applied the immunity protection to the defendants, notwithstanding the reasoning of the majority, because of the principle that the purpose of the Bankruptcy Act is to encourage corporate officers, directors and shareholders to testify fully and freely as to corporate activities.

It should be further noted that in U.S. v. Weissman, 219 F 2d 837 (2 cir. 1955), Judge Hand applied the immunity application to a sole owner and president of a corporation

where the defendant was the only person financially interested and where the defendant had been directed to sign the Bankruptcy Schedules. The parallel to the instant case is graphic.

POINT II

THE USE OF THE WORD " DESIGNATED" IN THE
STATUTE CARRIES NO SPECIAL MEANING SO
THAT A STRAINED INTERPRETATION WOULD ACT
TO DEFEAT THE STATUTORY INTENT.

A reading of Title 11 U.S.C. Section 25(a)(10) and (b) would indicate the intent of Congress to give discretion to the Bankruptcy Court, when required, as to what person or persons should testify for the bankrupt corporation, and thereby acquire the immunity from the use or derivative use of said person's testimony in a subsequent prosecution against said individual.

Many situations can be contemplated where the discretion of the Bankruptcy Court might be involved so as to accomplish justice under all the circumstances. In the event, for instance, that several corporate representatives appear, the Bankruptcy Court might then designate one or more of them as the witnesses who can best shed light on the

affairs of the corporation and thus benefit the creditors. In another instance, a corporation may send some minor representative who is not well acquainted with the corporate affairs, and the Bankruptcy Court may choose to designate some other corporate representative as the witness most likely to furnish important information.

Thus, in construing the statutory intent as to the use of the word "designated" keeping in mind the whole statutory purpose, it is urged that the word "designated" is not an absolute pre-condition to the cloak of immunity but is an aid to the Court and to the creditors who are interested in as full an exposure of facts as possible.

That Congress should forego the use or derivative use of a witnesses' testimony in order to meet the needs of creditors is neither unprecedented nor shocking.

CONCLUSION

The decision of the District Court denying the defendant's motion to suppress evidence should be reversed and the judgment of conviction entered herein should likewise be reversed and vacated and the matter should

be remanded for further proceedings.

Respectfully submitted,

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APPENDIX.

RELEVANT DOCKET ENTRIES.

CRIMINAL DOCKET
UNITED STATES DISTRICT COURT

TITLE OF CASE

THE UNITED STATES

vs.

HOWARD COYNE

knowingly & fraudulently did conceal from the Trustee of the Estate of Sleep Shops Corporation, bankrupt, & from the creditors in said bankruptcy proceeding, property belonging to the Estate of said bankrupt (Cts. 1, 2, 3); individually & as the agent of Sleep Shops Corporation, Bankrupt, and in contemplation of a Bankruptcy proceeding by & against said Sleep Shops Corporation, and with intent to defraud the bankruptcy laws, knowingly & fraudulently did transfer & conceal property of said Sleep Shops Corporation, (Cts. 4, 5, 6); knowingly & fraudulently did make a false oath, as to a material matter in and in relation to proceedings in the Matter of Sleep Shops Corporation, Bankrupt, held before Referee in Bankruptcy (Cts. 7, 8, 9, 10, 11, 12), in vio. of Sect. 152, Title 18, U.S.C.; Conspiracy to commit offenses against the U.S., by knowingly & fraudulently concealing & transferring property of the value \$60,000, belonging to the Estate of Sleep Shops Corporation, a bankrupt (Ct. 13), in Violation of Sections 152, 371, Title 18, U.S.C.

Title 18

Sec. 152, 371

Offenses: May, Sept. Oct. 1972 13 Cts.

1974

Feb. 27 Filed Indictment.

* * *

DATE1977PROCEEDINGS

Jan. 14 Filed Decision and Order - Defendant's motion to suppress his testimony at the first meeting of creditors is therefore denied. The decision of the Court, which rests on the finding that the defendant was not designated by the Bankruptcy Judge pur. to Sect. 25(b), obviates the need for the court to decide whether or not the Government made derivative use of this testimony in its investigation and grand jury presentation--Curtin, J.; Meeting with the Court set for 2/1/77 - 9:00 a.m.

* * *

In the District Court of the United States

For the Western District of New York

THE UNITED STATES OF AMERICA

-vs-

HOWARD COYNE

NOVEMBER 1973 Session Term

No.

Vio. Title 18, U.S.C.,
Sections 152 and 371

COUNT I

The Grand Jury Charges:

That from on or about the 16th day of May, 1972 and continuously thereafter until the date of the return of this indictment, in the Western District of New York and elsewhere, the defendant, HOWARD COYNE, knowingly and fraudulently did conceal from the Trustee of the Estate of Sleep Shops Corporation, Bankrupt, (Docket No. BK-72-1453) and from the creditors in said bankruptcy proceeding, property of the value of \$30,000, belonging to the Estate of said Bankrupt, consisting of cashier's check # S 824482 drawn on the Continental Illinois National Bank and Trust Company of Chicago, Chicago, Illinois in the amount of \$30,000, dated May 16, 1972, and the proceeds of said check; all in violation of Title 18, United States Code, Section 152.

COUNT II

The Grand Jury Further Charges:

That from on or about the 16th day of May, 1972 and continuously thereafter until the date of the return

of this indictment, in the Western District of New York and elsewhere, the defendant, HOWARD COYNE, knowingly and fraudulently did conceal from the Trustee of the Estate of Sleep Shops Corporation, Bankrupt, (Docket No. BK-72-1453) and from the creditors in said bankruptcy proceeding, property of the value of \$25,000, belonging to the Estate of said Bankrupt, consisting of cashier's check # E 1004229 drawn on the Harris Trust and Savings Bank, Chicago, Illinois in the amount of \$25,000, dated May 16, 1972, and the proceeds of said check; all in violation of Title 18, United States Code, Section 152.

COUNT III

The Grand Jury Further Charges:

That from on or about the 16th day of May, 1972 and continuously thereafter until the date of the return of this indictment, in the Western District of New York and elsewhere, the defendant, HOWARD COYNE, knowingly and fraudulently did conceal from the Trustee of the Estate of Sleep Shops Corporation, Bankrupt, (Docket No. BK-72-1453) and from the creditors in said bankruptcy proceeding, property of the value of \$5,000, belonging to the Estate of said Bankrupt, consisting of a check # 11527 drawn on the Exchange National Bank of Chicago, Chicago, Illinois in the amount of \$5,000, dated May 16, 1972, and the proceeds of said check; all in violation of Title 18, United States Code, Section 152.

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COUNT IV

The Grand Jury Further Charges:

That from on or about the 16th day of May, 1972 and continuously thereafter until the date of the return of this indictment, in the Western District of New York and elsewhere, the defendant, HOWARD COYNE, individually and as the agent of Sleep Shops Corporation, Bankrupt, (Docket No. BK-72-1453) and in contemplation of a bankruptcy proceeding by and against said Sleep Shops Corporation and with intent to defraud the bankruptcy laws, knowingly and fraudulently did transfer and conceal property of said Sleep Shops Corporation of the value of \$30,000 consisting of cashier's check # S 824482 drawn on the Continental Illinois National Bank and Trust Company of Chicago, Chicago, Illinois in the amount of \$30,000, dated May 16, 1972, and the proceeds of said check; all in violation of Title 18, United States Code, Section 152.

COUNT V

The Grand Jury Further Charges:

That from on or about the 16th day of May, 1972 and continuously thereafter until the date of the return of this indictment, in the Western District of New York and elsewhere, the defendant, HOWARD COYNE, individually and as the agent of Sleep Shops Corporation, Bankrupt,

(Docket No. BK-72-1453) and in contemplation of a bankruptcy proceeding by and against said Sleep Shops Corporation and with intent to defraud the bankruptcy laws, knowingly and fraudulently did transfer and conceal property of said Sleep Shops Corporation of the value of \$25,000 consisting of cashier's check # E 1004229 drawn on the Harris Trust and Savings Bank, Chicago, Illinois in the amount of \$25,000, dated May 16, 1972, and the proceeds of said check; all in violation of Title 18, United States Code, Section 152.

COUNT VI

The Grand Jury Further Charges:

That from on or about the 16th day of May, 1972 and continuously thereafter until the date of the return of this indictment, in the Western District of New York and elsewhere, the defendant, HOWARD COYNE, individually and as the agent of Sleep Shops Corporation, Bankrupt, (Docket No. BK-72-1453) and in contemplation of a bankruptcy proceeding by and against said Sleep Shops Corporation and with intent to defraud the bankruptcy laws, knowingly and fraudulently did transfer and conceal property of said Sleep Shops Corporation of the value of \$5,000 consisting of check #11527 drawn on the Exchange National Bank of

of Chicago, Chicago, Illinois in the amount of \$5,000, dated May 16, 1972, and the proceeds of said check; all in violation of Title 18, United States Code, Section 152.

COUNT VII

The Grand Jury Further Charges:

That on or about the 1st day of September, 1972, in the Western District of New York, the defendant, HOWARD COYNE, knowingly and fraudulently did make a false oath as to a material matter in and in relation to proceedings in the matter of Sleep Shops Corporation, Bankrupt, (Docket No. BK-72-1453) held before the Honorable Beryl E. McGuire, Referee in Bankruptcy, United States District Court for the Western District of New York in that he stated under oath in Paragraph 7 of Schedule A of the Statement of Affairs filed on behalf of said Sleep Shops Corporation that the only bank accounts maintained in Sleep Shops Corporation's name within two years from the filing of the original petition were at Bank of Buffalo, Manufacturers and Traders Trust Company and at Marine Midland and that this statement was false and contrary to the oath taken by defendant HOWARD COYNE, as defendant HOWARD COYNE then and there well knew and believed, in that defendant HOWARD COYNE maintained other bank accounts in his name and in Sleep Shops Corporation's name within said two year period; all in violation of Title 18, United States Code, Section 152.

COUNT VIII

The Grand Jury Further Charges:

That on or about the 1st day of September, 1972, in the Western District of New York, the defendant, HOWARD COYNE, knowingly and fraudulently did make a false oath as to a material matter in and in relation to proceedings in the matter of Sleep Shops Corporation, Bankrupt, (Docket No. BK-72-1453) held before the Honorable Beryl E. McGuire, Referee in Bankruptcy, United States District Court for the Western District of New York in that he stated under oath at Paragraph 11 of Schedule A of the Statement of Affairs filed on behalf of said Sleep Shops Corporation that no property of Sleep Shops Corporation was transferred or disposed of, other than in the ordinary course of business during the year immediately preceding filing of the original petition and that this statement was false and contrary to the oath taken by defendant HOWARD COYNE as defendant HOWARD COYNE then and there well knew and believed, in that defendant HOWARD COYNE did transfer and dispose of certain property of Sleep Shops Corporation other than in the ordinary course of business within said one year period; all in violation of Title 18, United States Code, Section 152.

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COUNT IX

The Grand Jury Further Charges:

That on or about the 1st day of September, 1972, in the Western District of New York, the defendant, HOWARD COYNE, knowingly and fraudulently did make a false oath as to a material matter in and in relation to proceedings in the matter of Sleep Shops Corporation, Bankrupt, (Docket No. BK-72-1453) held before the Honorable Beryl E. McGuire Referee in Bankruptcy, United States District Court for the Western District of New York in that he stated under oath in Paragraph A of Schedule B(2) of the Statement of Affairs filed on behalf of said Sleep Shops Corporation that Sleep Shops Corporation had no cash on hand and that this statement was false and contrary to the oath taken by defendant HOWARD COYNE, as defendant HOWARD COYNE then and there well knew and believed, in that Sleep Shops Corporation had cash on hand; all in violation of Title 18, United States Code, Section 152.

COUNT X

The Grand Jury Further Charges:

That on or about the 1st day of September, 1972, in the Western District of New York, the defendant, HOWARD COYNE, knowingly and fraudulently did make a false oath as to a material matter in and in relation to proceedings in the matter of Sleep Shops Corporation, Bankrupt,

(Docket No. BK-72-1453) held before the Honorable Beryl E. McGuire, Referee in Bankruptcy, United States District Court for the Western District of New York in that he stated under oath in Paragraph D of Schedule B(3) of the Statement of Affairs filed on behalf of said Sleep Shops Corporation that Sleep Shops Corporation had no deposit of money in banking institutions and elsewhere and that this statement was false and contrary to the oath taken by defendant HOWARD COYNE, as defendant HOWARD COYNE then and there well knew and believed, in that Sleep Shops Corporation had deposits of money in its name in certain banking institutions; all in violation of Title 18, United States Code, Section 152.

COUNT XI

The Grand Jury Further Charges:

That on or about the 19th day of September, 1972 in the Western District of New York, at proceedings in the matter of Sleep Shops Corporation, Bankrupt, (Docket No. BK-72-1453) held before the Honorable Beryl E. McGuire, Referee in Bankruptcy, United States District Court for the Western District of New York, the defendant, HOWARD COYNE, knowingly and fraudulently did make a false oath as to a material matter in and relation to said proceedings in that he testified that Adele W. Art loaned Sleep Shops

Corporation, the Bankrupt, \$90,000 in return for an assignment of the proceeds of certain insurance policies which proceeds were due said Sleep Shops Corporation as a result of a fire loss on April 9, 1972 and that no part of said \$90,000 was deposited in any bank but instead said \$90,000 was kept by him in cash and used to pay the rent owed by said Sleep Shops Corporation and to pay suppliers and customers of said Sleep Shops Corporation and that said testimony was false and contrary to the oath taken by defendant, HOWARD COYNE, as defendant HOWARD COYNE then and there well knew and believed, in that Adele W. Art loaned Sleep Shops Corporation \$60,000 and that said \$60,000 was deposited into certain bank accounts and that certain of the proceeds of said \$60,000 was not used to pay creditors of Sleep Shops Corporation; all in violation of Title 18, United States Code, Section 152.

COUNT XII

The Grand Jury Further Charges:

That on or about the 3rd day of October, 1972,
in the Western District of New York, at proceedings

in the matter of Sleep Shops Corporation, Jankrupt, (Docket No. BK-72-1453) held before the Honorable Beryl E. McGuire, Referee in Bankruptcy, United States District Court for the Western District of New York, the defendant, HOWARD COYNE, knowingly and fraudulently did make a false oath as to a material matter in and relation to said proceedings in that he testified that Adele W. Art loaned Sleep Shops Corporation, the Bankrupt, \$90,000 and that no part of said \$90,000 was deposited in any bank but instead was kept by him and paid out in cash and money orders to creditors of said Sleep Shops Corporation and that said testimony was false and contrary to the oath taken by defendant HOWARD COYNE, as defendant HOWARD COYNE then and there well knew and believed, in that Adele W. Art loaned Sleep Shops Corporation \$60,000 and that said \$60,000 was deposited into certain bank accounts and that certain of the proceeds of said \$60,000 was not used to pay creditors of Sleep Shops Corporation; all in violation of Title 18, United States Code, Section 152.

COUNT XIII

The Grand Jury Further Charges:

That beginning on or about the 1st day of July, 1971 and continuing thereafter until the date of return of this indictment, in the Western District of New York and elsewhere, the defendant, HOWARD COYNE, wilfully, knowingly and unlawfully combined, conspired and agreed with Helen Coyne and with other persons unknown to this Grand Jury to commit certain offenses against the United States, to wit: to violate Section 152, Title 18, United States Code, by knowingly and fraudulently concealing and transferring property of the value of \$60,000 belonging to the Estate of Sleep Shops Corporation, a Bankrupt; all in violation of Title 18, United States Code, Section 371.

OVERT ACTS

At the times hereinafter mentioned, the defendant, HOWARD COYNE, committed the following overt acts in furtherance of said conspiracy and to effectuate the objects thereof:

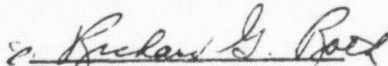
1. On or about May 15, 1972, in the Western District of New York, the defendant, HOWARD COYNE, as President of said Sleep Shops Corporation, assigned to Adele W. Art \$162,500 of the proceeds of certain policies of fire insurance due to Sleep Shops Corporation as a result of a certain fire loss which occurred on April 9, 1972.

2. On or about May 17, 1972 in the Western District of New York, the defendant, HOWARD COYNE, accepted three checks totaling \$60,000 as a loan from Adele W. Art to Sleep Shops Corporation in payment of said assignment.

3. On or about June 8, 1972 the defendant, HOWARD COYNE, deposited one of said checks in the amount of \$30,000 into an account at the Republic National Bank in Dallas, Texas.

JOHN T. ELFVIN
United States Attorney

A TRUE BILL:


Foreman

15a

DECISION AND ORDER

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff

-vs-

CR-74-70

HOWARD COYNE,

Defendant

APPEARANCES: RICHARD J. ARCARA, ESQ.
United States Attorney
(WILLIAM M. SKRETNY, ESQ., of Counsel)
Buffalo, New York, for the Government.

ROBERT P. FREEDMAN, ESQ.
Buffalo, New York, for the Defendant.

The defendant in this case has been charged in a thirteen-count indictment. Counts I through VI of the indictment charge the defendant with substantive violations of Title 18, United States Code, Section 152, in that he defrauded creditors by unlawfully transferring and concealing property of the Sleep Shops Corporation, the bankrupt. Counts VII through XII charge the defendant with knowingly and fraudulently making a false oath as to a material matter in the bankruptcy proceeding in the filing of various schedules relating to it, also in

violation of §152. Count XIII charges the defendant with conspiracy in violation of the same section.

Defendant has moved, pursuant to a claimed grant of immunity under 11 U.S.C. §25(a)(10) [Bankruptcy Act of 1970, §7(a)(10)], to suppress the use of his testimony given at the first meeting of creditors. Previously, the defendant moved to dismiss the indictment on the grounds that the Government had improperly used this same testimony in presenting evidence to the grand jury. This motion was denied on November 6, 1974.

The statutory language upon which the defendant relies reads, in pertinent part, as follows:

(a) The bankrupt shall . . .
(10) at the first meeting of his creditors, at the hearing upon objections, if any, to his discharge and at such other times as the court shall order, submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate or the granting of his discharge; but no testimony, or any evidence which is directly or indirectly derived from such testimony, given by him shall be offered in evidence against him in any

criminal proceeding, except such testimony as may be given by him in the hearing upon objections to his discharge:

(b) Where the bankrupt is a corporation, its officers, the members of its board of directors or trustees or of other similar controlling bodies, its stockholders or members, or such of them as may be designated by the court, shall perform the duties imposed upon the bankrupt by this title.

11 U.S.C. §25(a),(b). (Emphasis added).

The defendant contends that this statutory grant of immunity is automatic and that the Government has the burden of establishing that it made no use or derivative use of the testimony in question. There is support for the proposition that §25(10)(a) provides an automatic immunity grant. See Keeney & Serino, The Effect of the Organized Crime Control Act of 1970 in Bankruptcy Proceedings, 46 Am. Bankr. L.J. 1, 10 (Jan. 1972), in which the authors state:

Under the bankruptcy immunity the bankrupt receives an automatic grant for any testimony (and leads) given by him at a hearing which he was directed to attend. There is no prerequisite, to the conferring of immunity, that a claim be made by the witness that the answer will tend to incriminate and a refusal to answer on that basis. (Emphasis in original). 1

In this case, however, we are dealing not only with §25(10(a)), but with subsection (b) as well. Prior to 1938, it was unclear whether a corporate officer could claim the protection of 10(a). In that year, the Congress amended the statute by adding (b), thus clearing up part of the confusion. See United States v. Castellana, 349 F.2d 264, 273 (2d Cir. 1965), cert. denied, 383 U.S. 928 (1966). The remaining uncertainty, which is critical to a determination in this case, is the meaning of the word "designated" in subsection (b).

The Second Circuit, in Castellana, stated:

As we read the cases, a meaningful distinction, rooted in the statutory language, should be drawn between the corporate officer who testifies voluntarily, and thus cannot claim the privilege, and the one who, having been directed to appear by the bankruptcy court, has thereby been "designated by the court [to] perform the duties imposed upon the bankrupt by this title." United States v. Castellana, supra, 349 F.2d at 273 (emphasis in original).

Later, in the same opinion, the court further emphasized the interaction of subsections (a) and (b):

. . . Section 7, sub. b, in merely stating who may be designated to perform the duties imposed upon a corporate bankrupt, makes no explicit

reference to extension of the Section 7, sub. a(10) privilege. Thus, we believe that Section 7, sub. b cannot be read in a vacuum and must be considered in the light of Section 7, sub. a as conferring immunity only if the director or shareholder is specifically designated to perform the bankrupt's duties.

United States v. Castellana, supra,
349 F.2d at 274 (emphasis added).

Surprisingly, the case law on §25(b) "designations" is sparse. In a case which involved the scope of the immunity afforded under a prior version of the statute,^{2/} the designation question was alluded to in these words:

Apparently, Dornau had been designated under §7(b) . . . as one of the corporate officers required to perform the duties of the bankrupt and appeared at the meeting pursuant to order.

United States v. Dornau, 491 F.2d 473,
476, n.2 (2d Cir. 1974), cert. denied,
419 U.S. 872 (1974) (emphasis added).

See also id., at 479, n.9; United States v. Matulich,
474 F.2d 596, 597 (9th Cir. 1973). Other cases have dealt with the refusal of certain witnesses to testify after having been ordered to testify by the Bankruptcy Judge under §10(a), (b). See Block v. Consino, 535 F.2d 1165 (9th Cir. 1976); Goldberg v. Weiner, 480 F.2d 1067 (9th Cir. 1973);

In re Hoffman Can Corp., 373 F.2d 622, 624 (3d Cir. 1967). Whether the immunity grant of §7(10)(a) is automatic, or whether it requires an affirmative invocation of the fifth amendment or of the statute, has not yet been determined. United States v. Boyd, 404 F.Supp. 413, 416 (S.D.N.Y. 1975).

It might seem somewhat anomalous that an individual bankrupt would receive automatic immunity under §25(a)(10), whereas a corporate bankrupt's officer or shareholder would not receive immunity under §25(b) unless the Bankruptcy Judge specifically designates that he act for the bankrupt corporation. See Castellana, supra, 349 F.2d at 278 (J. Hays, dissenting). But, as this court reads the majority opinion in Castellana, and as it reads the statute itself, this distinction is controlling.

The transcript of the first meeting of creditors reveals only that the following discussion took place:

THE COURT:

First Meetings. First
matter on the calendar.
Sleep Shops Corporation.

Mr. Ginsberg, Mr. Privitera,
you are appearing for the

Bankrupt?

MR. GINSBERG: Yes.

THE COURT: Is an officer of the Bankrupt present?

MR. GINSBERG: Yes.

THE COURT: All right, please take the stand.

The court then administered the oath, and questioning proceeded. No statutory immunity claim was raised by the defendant's lawyer nor was the fifth amendment asserted. No express designation of Mr. Coyne was made by the Bankruptcy Judge.

It is axiomatic that a corporation can only speak through a living person. Where, as happened here, the Bankruptcy Judge merely asks who is appearing for the bankrupt corporation, and an officer voluntarily takes the stand and testifies, we would be straining language and circumstance to interpret these acts as a "designation" sufficient to confer immunity under §25(b).

Defendant's motion to suppress his testimony at the first meeting of creditors is therefore denied. The decision of the court, which rests on the finding that the

defendant was not designated by the Bankruptcy Judge pursuant to §25(b), obviates the need for the court to decide whether or not the Government made derivative use of this testimony in its investigation and grand jury presentation.

So ordered.


JOHN T. CURTIN
United States District Judge

DATED: January 14, 1977

1/

For a somewhat different view of the statute, see McGuire, Immunity Under the Bankruptcy Act Automatic or Controlled? 48 Am. Bankr. L.J. 159 (1974).

2/

In 1970, subsection (a)(10) of the statute was amended to include the words "or any evidence which is directly or indirectly derived from such testimony." Previous to this amendment, no provision was made to prohibit derivative use by the Government of the bankrupt's testimony. See United States v. Dornau, 491 F.2d 473, 479-480 (2d Cir. 1974).

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County of Genesee)
City of Batavia)

USA vs. Howard Coyne
77-1434

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Patricia A. Lacey

PATRICIA A. LACEY
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